

## SB 435

Chairman Laslovich and members of the Judiciary Committee, today I bring you SB 435. I am senator Verdell Jackson, SD 5 from Flathead County. I represent the East side of Flathead Lake and the cities of Bigfork, Lakeside, Somers and Lower Kalispell.

SB 435 is another bill that is necessary because it is very likely that Montana Water Law has not been followed in the past when non-consumptive water rights were issued to hydropower companies. Montana's Constitution, Article IX, sub3 states that Montana owns all of the water in its borders for the use of its people. MCA 85-1-101 is the policy provisions for the water resources section of law. Policy consideration no 4 is: "The development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural and other beneficial uses."

Members of the committee the purpose of this bill is to give the control of Montana's water back to the State of Montana and to allow power generation companies to use all of the water that enters their storage and flows to their dams in the most efficient way to generate power. This is consistent with the purpose of the non-consumptive water rights that were given to them in the beginning. The goal was to match their water rights to the capacity of their generators, not to the capacity of the rivers. Since the water rights were non-consumptive and the plants were essentially "run of the river" consideration was not given to people upstream or downstream when the rights were issued. The rights contain a rate, volume, period of use and no conditions. The magnitude of the water rights of all power companies typically encompass all of the water in the rivers well over 95% of the calendar year which technically makes water available to junior uses only a few days during the highest yearly flow of the rivers (only 16 days a year at Noxon Rapids).

In the interest of time, members of the committee, I am going to summarize the most compelling reasons why we must pass this bill. I will use typical examples from the Noxon Rapids Dam because I have done the most research on it.

1. Human impact on the flow and volume of the Clark Fork and Missouri Rivers is not visible in the USGS (United State Geological Survey) data base. Human depletion of the main stem of these rivers is so small compared to their flow and volume that it can not be detected by the measuring devices that have been in place for almost 100 years. In fact there is more water in the rivers than 80 or 90 years ago because is being impounded and used in Montana. See page 13 in your handout.

2. The building of Hungry Dam in 1955 enabled Avista to use 921,374 af of water that would have been spilled during the Spring run off. The water was impounded and spread over 8 other months. See page 9. Note this windfall is more that twice the amount of estimated water depletion used for all irrigation in the Clark Fork Basin (400,526 af).

3. Avista has been aggressively trying to close the Clark Fork Basin to new surface water rights and recently to both surface and ground water rights by using the water rights of the Noxon Rapids Dam: Rate--50,000 cfs (Average flow of CF river 20,000 cfs) and Volume—30 Million af (average yearly volume 14.5 million af).

4. Avista negotiated a deal with Governor Radicot to temporarily close the Clark Fork Basin to new surface water rights for two years in 1999. I was given the bill to close the basin permanently in the 2001 session. I took the closure out of the bill and convinced Avista and other water users to participate in the Clark Fork River Water management Task to find solutions to water availability.

5. Avista tried again to close the basin during the relicensing process with FERC. FERC rejected the agreement between Avista and the State of Montana and stated that water rights were a state issue.

6. Avista successfully protested a new surface water right application for the Thompson River Lumber Company. This case went to a hearing officer. I accidentally found out about the hearing and went. It was 6 hours long and I requested a CD of the hearing. I believed at the time that Avista would be unsuccessful because they did not prove an adverse impact. Avista took the 400af that was applied for by Thompson River Lumber and on paper ran it through both of their generators without considering any return flow or intermittent use. Noxon Rapids produced \$1700 worth of electricity and Cabinet Gorge in Idaho produced \$1100 during the first year according to Avista's projections. They extended the model out for 20 years and more than doubled the price for the electricity during that time. Their total impact of lost power generation came to \$92,000.

This model has several problems. The assumption was made that the dams use every drop of water to make electricity except when the flow is above their maximum water rate which is just 16 days a year for Noxon Rapids. There were no generation records provided to document this assumption. The CF Avista facilities are peaking plants and do not generate electricity all the time and their water storage is very small considering they can only drop their live storage by 2 feet per day. The second problem is that the dam in Idaho likely can't be counted in the impact. The third problem is that Adverse impact to you may be different than adverse impact to Avista. Avista is a 5 billion dollar company with sales of over 1.5 billion per year. The \$2800 at the Avista Clark Fork facility if actual real would only result in the loss of .00046% of the sales at the Clark Fork facility. If you made \$200,000 per year wouldn't you part with \$1 to be a good neighbor? Would this be an adverse impact to your business? If the return flow of 50% that was returned to the river after cooling was counted, the impact would be only \$1 for every \$400,000 in sales or .00023%.

I calculated the impact on the actual amount of water that flows down the Clark Fork River with the assumption that Avista would use every drop of water. The Thompson Lumber Co requested 400af a year. The average volume of the CF River is 14.5 Million af. Allowing for a 65% return flow, the impact was .0000096. This is less than one out of 100 thousandth of the total yearly volume. Regardless of how you calculate it, there is no adverse impact.

The result of the hearing and subsequent adoption by DNRC is:

Application by Thompson River Lumber Company is DENIED

"The Objector (Avista) will not receive all water to which they are entitled at times the flows in the Clark Fork River do not exceed 50,000 cfs. Flows exceed 50,000 cfs only 16-24 days per year. The record here shows that Avista will be adversely affected by diminished flows in the amount of the Applicant's proposed diversion on the days where flows do not exceed 50,000 cfs. The applicant failed to prove by a preponderance of the evidence that prior appropriators will not be adversely affected by the proposed appropriation."

The above decision does not contain a test of adverse impact. Using the above method any amount is considered an adverse impact unless avista is spilling water at amounts of flow above 50,000 cf which happens only 16 days a year on the average and sometimes not at all.

Contrary to what you will hear today from the opponents to this bill, Montana's Constitution or state law does not support the sorry state of affairs we have today with the power companies depriving our kids and grandkids the use of water up stream from their dams. I hope you do not heed their threats of lawsuits. We should welcome a lawsuit because this situation is contrary to the very essence of our Constitution and state law. The state has a duty to correct this situation. It is unlikely that we as individuals will be able to defend our rights against the well funded power generation companies.

The outcome of this process will determine who controls the use of water in Montana. Will it be the State of Montana who owns the water via the State Constitution or the power generation companies?